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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2080

THE MEAD CORPORATION AND WESTVACO CORPORATION,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LOWELL E. SACHNOFF
ANDREW M. SCHATZ
BARRY S. ROSEN
SACHNOFF SCHRAGER JONES WEAVER & RUBENSTEIN, LTD.
One IBM Plaza, Suite 4700
Chicago, IL 60611

JERRY S. COHEN
MICHAEL HAUSFELD
KOHN, MILSTEIN & COHEN
1776 K Street, N. W.
Washington, D. C. 20006

STEPHEN D. SUSMAN
GARY V. McGOWAN
WILLIAM H. WHITE
MANDELL & WRIGHT
806 Main Street, 21st floor
Houston, Texas 77002

VANCE K. OPPERMAN
McGOVERN, OPPERMAN & PAQUIN
1100 National City Bank Bldg.
Minneapolis, Minnesota 55402

Attorneys for Plaintiffs-Respondents

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

QUESTIONS PRESENTED

1. Whether the denial of a motion for recusal under 28 U. S. C. §§ 144 and 455 is an appealable interlocutory order.

2. Whether the Court of Appeals erred in exercising its discretion not to issue a writ of mandamus ordering a district judge to recuse himself.

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BRIEF OF RESPONDENTS-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents-Plaintiffs, representatives of a class of persons purchasing corrugated containers from defendants, including Petitioners, respectfully request that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

STATEMENT OF THE CASE

I. HISTORY OF THE LITIGATION

In March 1977, certain buyers of corrugated containers and corrugated sheets brought class action lawsuits in various district courts around the country alleging that certain manufacturers of corrugated containers and sheets had conspired to fix prices thereof in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1. Among those cases was an action filed by Adams Extract Co. in the Southern District of Texas on March 21, 1977. This case was assigned to the Honorable John V. Singleton, Jr.

On November 29, 1977, the Judicial Panel on Multidistrict Litigation transferred all such actions to Judge Singleton in Houston. *See In Re Corrugated Container Antitrust Litigation,* 441 F. Supp. 921 (J. P. M. L. November 29, 1977). The court subsequently determined that the cases should proceed as a class action on behalf of a class consisting of all persons who bought corrugated containers and sheets from 37 defendants during the period 1960-1978—approximately 300,000 persons.

At the time of this transfer, a grand jury in Houston was investigating possible price fixing in the corrugated container industry. On January 25, 1978, the grand jury indicted nine corporate manufacturers of corrugated containers and sheets and nine individuals employed by such corporations.* Mead Corporation ("Mead") was among those companies indicted, Westvaco Corporation ("Westvaco") was not. Thus, at this time both the criminal cases and the private cases ("MDL 310") were pending in the Southern District of Texas.

At the first pretrial conference in MDL 310, held on February 9, 1978, Judge Singleton announced that he would preside over

* See *United States* v. *International Paper Co.,* Cr. No. H-78-11 (S. D. Tex., filed January 25, 1978); *United States* v. *Boise Cascade Corp.,* Cr. No. H-78-12 (S. D. Tex., filed January 25, 1978).

both the criminal and civil cases. Neither Mead nor any other defendants objected to this. The criminal trial began on January 22, 1979, and ended on April 27, 1979. Two corporate defendants, including Mead, had elected to go to trial, and both were acquitted by the jury.

Following completion of the criminal trial, Judge Singleton continued to preside over all aspects of the civil litigation, entering numerous pretrial orders and supervising massive discovery including the production of millions of documents and the taking of hundreds of depositions. In his Order denying Mead's motion for recusal dated September 19, 1979, Judge Singleton stated that he had "spent almost two years of intensive work on this litigation, and the familiarity (he had) gained with the issues and the industry could not quickly or inexpensively be duplicated by another judge." (Petition at C-9.)*

By the Spring of 1980 all but three of the thirty-seven defendants in the civil action entered into settlement agreements with plaintiffs. The remaining three defendants, including Petitioners Mead and Westvaco, have proceeded to trial by jury which began June 9, 1980. As of the date of filing of this Brief in Opposition, Judge Singleton will have presided over the trial of these defendants for twelve weeks.

II. THE DECISIONS BELOW

A. Motions by Petitioners

On August 30, 1979, almost twenty months after Judge Singleton first announced that he would preside over both the

* "Petition" refers to Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit, filed in this case. References to page numbers beginning with the letter "B" are to Appendix B of the Petition, the opinion in this case of the Court of Appeals for the Fifth Circuit. References to page numbers beginning with the letter "C" are to Appendix C of the Petition, the opinion in this case of the District Court for The Southern District of Texas.

criminal and civil cases, Mead filed its motion for recusal.* Between May 1, 1979—the end of the criminal trial—and August 30, the Court entered no fewer than nineteen pretrial orders,** many of which contained multiple rulings on various contested issues. Throughout this period, Mead did not claim that any of Judge Singleton's rulings in either the criminal or civil litigation were affected by his supposed "prejudice" against any party. (Petition at C-5.)

Mead sought Judge Singleton's recusal because of his ruling in the *Corrugated* criminal trial that hearsay statements of alleged co-conspirator defendants were admissible as evidence pursuant to *United States* v. *James,* 576 F. 2d 1121 (5th Cir. 1978), *modified* 590 F. 2d 575 (5th Cir.) (en banc) *cert. denied,* 442 U. S. 917 (1979), and because of statements allegedly made by Judge Singleton to a golfing partner the day following conclusion of the *Corrugated* criminal trial.***

In support of the motion for recusal, Harold F. Baker and William Green, counsel for Mead, filed affidavits relating largely to their phone conversation with Mr. William Maddux, the person to whom Judge Singleton allegedly made the golf course comments. None of the supporting affidavits alleges "personal" bias or prejudice on the part of Judge Singleton.

Mr. Maddux filed an affidavit of his own in which he expressed "shock and indignation" as to the content of the Baker affidavit and set forth a counter-statement of facts. (Petition at C-14 to C-17.)

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* Appellants Westvaco, Georgia-Pacific Corporation and Crown Zellerbach Corporation joined in Mead's motion shortly thereafter. (All appellants will hereinafter be referred to collectively as "Mead," since Mead was primarily resonsible for the motion to disqualify and the appeal.)

** See Pretrial Orders 43 through 62.

*** Although Mead also sought Judge Singleton's recusal on the basis of statements made by his law clerk, Petitioners do not raise this issue in their Petition.

B. The District Court's Decision

Judge Singleton orally denied Mead's motion for recusal on September 5, 1979 followed by a written Memorandum and Order dated September 11, 1979. (Petition at C-1 to C-17.) In his Memorandum, Judge Singleton clarified the nature of the statements he made to Mr. Maddux on the golf course* and found that:

> [T]he allegations contained in the motion and affidavits [are] insufficient as a matter of law to raise in any reasonable person's mind a belief that [the court is] prejudiced against Mead, or any other litigant in this case, or that the rulings [it has] made and may make in the future will be motivated by any other desire than the desire to provide equal justice under the law.

(Petition at C-3).**

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* Judge Singleton recollected his conversation as follows:

> During that conversation my recollection is that I did say that I considered it odd that counsel for the United States should have tried a case of that nature and that magnitude with virtually no documentary evidence, especially in view of the fact that the document depository had been said by all parties to contain almost two million documents. The civil plaintiffs had filed a selection of these documents with the court in the civil litigation. My knowledge of those documents is confined to my judicial experience in the civil litigation.
>
> I also agreed with Mr. Maddux that it seemed strange that so many of the defendants in the civil case would have paid so much money, nearly $300 million, to settle a completely unfounded case. Even if this remark could be stretched to constitute a statement that I thought the settling defendants guilty, that would not apply to Mead or any other defendant who has not entered into a settlement agreement in this litigation.

(Petition at C-7.)

** Judge Singleton also stated that in his opinion, Mead's recusal motion was "frivolous" and that as in many expensive multidistrict

(Footnote continued on next page.)

On September 14, 1979, Mead filed its Motion for Reconsideration of its Motion for Judge Singleton To Recuse Himself and for Judge Singleton To Take No Further Action In This Matter. By order dated September 20, 1979, the court denied this motion as well.

C. Appeals to and Decisions of the Fifth Circuit

Petitioners sought review of the district court's refusal to disqualify himself both by way of direct appeal, No. 79-3369, and through a request that the Court of Appeals exercise its power to issue a writ of mandamus, No. 79-3653.

The Fifth Circuit panel unanimously dismissed the appeal for want of an appealable order applying the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), (Petition at B-3), and denied the request for a writ of mandamus. (Petition at B-7.) Petitioners seek a Writ of Certiorari to review these decisions of the Court of Appeals.

(Footnote continued from preceding page.)
antitrust or other business litigations "the very large amount of money on the table in this litigation . . . provide(d) a strong incentive to attorneys in the case to leave no stone unturned, however unpromising or unsavory." (Petition at C-5, C-9.)

REASONS FOR DENYING THE WRIT

This Court should deny the Writ because the Court of Appeals properly applied controlling precedent in dismissing Petitioners' appeal for want of an appealable order and in denying Petitioners' request for a writ of mandamus. Immediate consideration by this Court would not resolve matters of importance either to these parties or to other litigants.

I. THE DENIAL OF PETITIONERS' DISQUALIFICATION MOTION ON ITS MERITS IS NOT RIPE FOR REVIEW BY THIS COURT

The issues presented by Petitioners, focusing on the merits of recusal, are not properly presented because even should this Court grant certiorari, Judge Singleton's determination not to recuse himself will not be before this Court. Rather, the only issues subject to this Court's review are whether the Fifth Circuit properly dismissed Petitioners' appeal for want of an appealable order and whether it properly denied their request for a writ of mandamus.

The Court of Appeals dismissed Petitioners' appeal and denied their request for a writ without reaching the merits of disqualification on the ground that full review of the disqualification issue was available upon appeal from final judgment. (Petition at B-4 and B-7) (*See Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949); *Helstoski* v. *Meanor*, 442 U. S. 500, 505 (1979)). The Court of Appeals also refused to issue the writ because Petitioners could not demonstrate a "clear and indisputable" right to its issuance. (Petition at B-7) (*See Kerr* v. *United States District Court*, 426 U. S. 394, 403 (1976)). While the Court of Appeals discussed the merits of disqualification with regard to the alternative ground, it

did so only to determine whether Petitioners had satisfied the greater burden of proving a clear right to issuance of the writ, not to determine the very different issue of whether disqualification was required on its merits.*

Thus, since the only issues that can be raised by Petitioners are whether the Court of Appeals properly dismissed the appeal and denied the request for a writ, and since determination of the disqualification issue on its merits was not a prerequisite to the Fifth Circuit's decision on either of these issues, Petitioners' focus on the merits of disqualification is improper and misleading. As will be shown, since the Court of Appeals properly applied standards enunciated by this Court in dismissing the appeal and in denying the writ of mandamus, the Petition for a Writ of Certiorari should be denied.

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* The Court of Appeals also, in dicta, discussed the merits of disqualification in anticipation of a possible appeal following final judgment in the case.

> To dispose of the present matter solely on the issues of appealability and entitlement to a writ of mandamus might put to rest questions concerning the propriety of further involvement in the case by the district judge. Nevertheless, the extraordinary stakes involved (the proposed partial settlement totals nearly $900 million, see Corrugated II, *supra,* 611 F. 2d at 89) and our experience with the progress of the litigation thus far convince us that *ultimately appellate consideration of the issue of disqualification will likely be necessary.* For those reasons we reach the merits of the contentions raised here. See part III, *infra.*

(Petition at B-3, n. 1) (Emphasis supplied.)

II. THE COURT OF APPEALS' DISMISSAL OF AN INTERLOCUTORY APPEAL UNDER THE COHEN DOCTRINE AND ITS REFUSAL TO ISSUE A WRIT OF MANDAMUS COMPELLING THE DISTRICT JUDGE TO RECUSE HIMSELF ARE NEITHER CONTROVERSIAL NOR IMPORTANT AND DO NOT MERIT THIS COURT'S CONSIDERATION

A. The Court of Appeals Properly Determined That a District Judge's Denial of a Motion for Disqualification Is Not an Appealable Interlocutory Order Under the Doctrine of Cohen v. Beneficial Industrial Loan Corp.

Petitioners seek this Court's review of the Court of Appeals' dismissal of their appeal for want of an appealable order under 28 U. S. C. § 1291. However, there is no conflict between the courts of appeals concerning the nonappealability of an interlocutory order denying a motion for disqualification. To the contrary, the Fifth Circuit followed controlling precedent in dismissing the appeal.

Under this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), an interlocutory order will not be immediately appealable unless the order is "effectively unreviewable on appeal from a final judgment." *Coopers and Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978). Overwhelming authority supports the proposition that disqualification questions are fully reviewable on appeal from final judgment.*

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* *See e.g., Davis* v. *Board of School Comm'rs*, 517 F. 2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U. S. 944 (1976); 13 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 3553 at 384; *Potashnick* v. *Port City Constr. Co.*, 609 F. 2d 1101, 1107-15 (5th Cir. 1980); *United States* v. *Clark*, 605 F. 2d 939, 941-42 (5th Cir. 1979); *Whitehurst* v. *Wright*, 592 F. 2d 834, 837-38 (5th Cir. 1979); *King* v. *United States*, 576 F. 2d 432, 436-37 (2d Cir.), *cert. denied*, 439 U. S. 850 (1978); *United States ex rel.*

(Footnote continued on next page.)

Thus the Fifth Circuit followed a long line of cases holding that questions concerning disqualification of judges are not appealable as interlocutory orders. *See United States* v. *State of Washington,* 573 F. 2d 1121, 1122 (9th Cir. 1978); *Scarrella* v. *Midwest Fed'l Savings & Loan,* 536 F. 2d 1207, 1210 (8th Cir.), *cert. denied,* 429 U. S. 885 (1976); *Robinson* v. *Largent,* 419 F. 2d 1327, 1328 (3d Cir. 1970); *Dubnoff* v. *Goldstein,* 385 F. 2d 717, 721 (2d Cir. 1967); *Rosen* v. *Sugarman,* 357 F. 2d 794, 796 (2d Cir. 1966). *See generally* 13 Wright, Miller & Cooper, *supra,* § 3553 at 385. Petitioners have cited no cases to the contrary and indeed do not even challenge the correctness of the Fifth Circuit's decision.

Since the Court of Appeals properly determined the appealability issue and since its decision does not conflict with a decision of another court of appeals there is no justification for this Court to consider the issue. Accordingly, the Petition for a Writ of Certiorari should be denied.

B. The Court of Appeals Acted Well Within Its Discretion in Refusing to Issue a Writ of Mandamus Ordering the District Court Judge to Disqualify Himself

The Court of Appeals was on equally solid ground in refusing to issue a writ of mandamus requiring Judge Singleton to recuse himself. The Court of Appeals denied the writ because Petitioners had other "adequate means to attain the relief (they) desire" as a result of full review on appeal from a final judgment (Petition at B-7), and because Petitioners could not prove a "clear and indisputable" right to the writ on its merits. (Petition at B-7.) These are precisely the standards which were recently reaffirmed by this Court as appropriate for determining

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(Footnote continued from preceding page.)
Weinberger v. *Equifax, Inc.,* 557 F. 2d 456, 463-64 (5th Cir. 1977), *cert. denied,* 434 U. S. 1035 (1978); *United States* v. *Partin,* 552 F. 2d 621, 636-40 (5th Cir.), *cert. denied,* 434 U. S. 903 (1977).

whether a writ of mandamus should issue. *Helstoski* v. *Meanor,* 442 U. S. 500, 505-506 (1979).*

Petitioners do not contest the Court of Appeals' use of these standards. Furthermore, Petitioners do not and cannot argue that no adequate means exist for review of the disqualification decision following final judgment. (See Petition at B-5, note 3.) Under *Helstoski* v. *Meanor, supra,* this factor alone supports the Fifth Circuit's denial of Petitioners' request for a writ of mandamus. Moreover, as will be shown below, Petitioners' cannot prove a "clear and indisputable" right to Judge Singleton's disqualification on its merits since as the Court of Appeals found, "(t)he legal duty of the district judge to disqualify himself is not merely debatable, it is nonexistent." (Petition at B-7.) For these reasons, this Court should deny Petitioners' request for a Writ of Certiorari.**

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* In *Helstoski, Id.,* this Court confirmed that issuance of a writ of mandamus "is in large part a matter of discretion with the court to which the petition is addressed", "that the party seeking issuance of the writ (must) have no other adequate means to attain the relief he desires, and that he satisfy the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.' " (*quoting Kerr* v. *United States District Court,* 426 U. S. 394, 403 (1976) (citations omitted)).

** The Petition should also be denied because it does not raise issues of fundamental importance to the parties to this case. The trial of this action began over two months ago and will be completed long before any decision is rendered by this Court. Should Petitioners prevail at trial, their request for relief from this Court would be mooted. However, should Respondents prevail, there is no question that Judge Singleton's refusal to disqualify himself would then be subject to review along with any other rulings which Petitioners claim to be error. Thus, even if the Fifth Circuit was clearly incorrect in deciding the appealability and mandamus issues, Petitioners would have an opportunity to obtain relief from this Court following renewal of their motion post trial.

III. THE COURT OF APPEALS PROPERLY DETERMINED THAT PETITIONERS DID NOT HAVE A CLEAR AND INDISPUTABLE RIGHT TO JUDGE SINGLETON'S DISQUALIFICATION

This Court has held that a judge should not be disqualified from presiding over a case unless it is shown that he has a "personal" bias against a party stemming from an "extrajudicial source." *See United States* v. *Grinnell Corp.*, 384 U. S. 563, 582-83 (1966); *Berger* v. *United States*, 255 U. S. 22, 32-33 (1921). In accordance with these holdings, the Fifth Circuit found that Judge Singleton's *James* ruling during the course of the *Corrugated* criminal trial was based upon "evidence appropriately before (him) in a situation as fully judicial as any imaginable" (Petition at B-13) and that his out of court comments following the trial merely reflected "the evidence and, at most opinions developed through (his) participation in the case," and were thus "distinctly judicial" as opposed to personal in nature. (Petition at B-17 to B-19.)

Petitioners do not challenge the Court of Appeals' use of the rule in *United States* v. *Grinnell Corp., supra,* in analyzing Judge Singleton's golf course statements. Rather, they claim that, as a factual matter, Judge Singleton's statements were not "based on matters of record evidence" but constituted "a personal and uninformed judgment." (Petition at 21.) Even a brief analysis of the record, however, will reveal that Judge Singleton's comments, made on the day following completion of the *Corrugated* criminal trial, were based entirely on his judicial experience and did not reveal a personal animus toward Petitioners. In no event could it be said that it is "clear and indisputable" that his comments were personal in nature. Certainly, certiorari would not be providently granted in order to review the specific facts upon which the Court of Appeals based its finding.

Petitioners seek an exception to the *Grinnell* rule, however, "in the limited circumstances when a judge rules on admissi-

bility of hearsay statements of co-conspirators" because in this circumstance the judge must determine "the ultimate issue to be decided by the jury." (Petition at 16.) As the Fifth Circuit pointed out, the creation of any such limited exception would be unfounded since a judge's ability to preside impartially, without personal bias toward the litigants, is no more affected by his making a *James* ruling than it is by his making any other ruling in the course of a judicial proceeding.

> We believe this situation not unlike countless others in which district court judges become thoroughly immersed in all aspects of a case, rule on the admissibility of evidence and on its sufficiency to permit a jury to determine the litigation's outcome, and even form conclusions on ultimate facts involved and then later preside at trials involving the same facts and/or the same parties. As long as judges are not disqualified under these circumstances—and overwhelming authority indicates that they are not—we have no difficulty in holding that Judge Singleton's *James* rulings in the criminal trial do not require his disqualification.

(Petition at B-12) (cases cited in footnote).

Indeed, judges routinely rule upon and exclude evidence, rule upon motions to suppress, receive and read presentencing reports, participate in settlement negotiations, determine summary judgment motions, and proceed with litigation that has been partially settled—all without disqualification. Yet under the logic of Petitioners' argument, a judge's *James* determination, even in a single case, would require his disqualification. Such a result would wreak havoc on the judiciary by prohibiting judges from completing any conspiracy trial which they start, a result all the more absurd in cases such as this where it is the jury, not the judge, which is charged with determining the "ultimate issues."

Moreover, it is the established rule that familiarity with defendants and/or the facts of a case that arises from earlier participation in judicial proceedings is not sufficient to disqualify a judge from presiding at a later trial. (Petition at B-14, note

17.) The cases relied upon by Petitioners to the contrary (Petition at 18-19) have been disregarded* or are clearly distinguishable on their facts.**

Thus, even should the merits of disqualification come before the Court of Appeals after final judgment, there is no question that Judge Singleton's decision not to recuse himself would be affirmed. Under these circumstances, it could not be said that Petitioners had a "clear and indisputable" right to the mandamus order they sought.

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* In *United States* v. *Bryan,* 393 F. 2d 90 (2d Cir. 1968), the Second Circuit suggested that a judge recuse himself from presiding over a case he previously tried which was remanded to him for retrial. Almost as soon as it announced this "rule," the Second Circuit began to undermine its rationale and to limit its application. *See United States* v. *Partin,* 552 F. 2d 621, 637-39 (5th Cir.) *cert. denied,* 434 U. S. 903 (1977); *United States* v. *Wolfson,* 558 F. 2d 59, 62-64 (2d Cir. 1977); *United States* v. *Bernstein,* 533 F. 2d 775, 784-85 (2d Cir.), *cert. denied,* 429 U. S. 998 (1976); *United States* v. *DiLorenzo,* 429 F. 2d 216, 221 (2d Cir. 1970), *cert. denied,* 402 U. S. 950 (1971).

Petitioners also rely on *Halliday* v. *United States,* 380 F. 2d 270 (1st Cir. 1967), *aff'd on other grounds,* 394 U. S. 831 (1969) for the proposition that a judge who tries one case should be disqualified from presiding over subsequent related proceedings. However in *United States* v. *Cowden,* 545 F. 2d 257 (1st Cir. 1976), *cert. denied,* 430 U. S. 909 (1977), the First Circuit did not follow this position stating that "the judicial system could not function if judges could deal but once in their lifetime with a given defendant, or had to withdraw from a case whenever they had presided in a related or companion case or in a separate trial in the same case." *Id.* at 265-266.

** In *United States* v. *Womack,* 454 F. 2d 1337 (5th Cir. 1972), *cert. denied,* 414 U. S. 1023 (1973), the judge had predetermined the defendant's guilt, as evidenced by his unequivocal, express statement to that effect. In the instant case, none of the alleged statements, taken individually or cumulatively, reflects that kind of personal bias.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request Petitioners' Writ of Certiorari be denied.

Respectfully submitted,

LOWELL E. SACHNOFF
ANDREW M. SCHATZ
BARRY S. ROSEN
SACHNOFF SCHRAGER JONES
WEAVER & RUBENSTEIN, LTD.
One IBM Plaza, Suite 4700
Chicago, IL 60611

STEPHEN D. SUSMAN
GARY V. McGOWAN
WILLIAM H. WHITE
MANDELL & WRIGHT
806 Main Street, 21st floor
Houston, Texas 77002

JERRY S. COHEN
MICHAEL HAUSFELD
KOHN, MILSTEIN & COHEN
1776 K Street, N. W.
Washington, D. C. 20006

VANCE K. OPPERMAN
McGOVERN, OPPERMAN
& PAQUIN
1100 National City Bank Bldg.
Minneapolis, Minnesota 55402

Attorneys for Plaintiffs-Respondents

see 7 9
9 7 2

seed

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